STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED November 3, 2005
v	No. 261793 Oakland Circuit Court
MARCELLUS ALLEN PRICE and DENISHA BASS, Defendants-Appellants.	LC No. 2003-054314-CK

Before: Fort Hood, P.J., and White and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. The majority concludes that defendant Price could not have reasonably anticipated that firing an AK47 at the ground in front of an SUV full of young ladies would result in harm. The undisputed evidence showed that he shot toward the SUV (in fact, toward its tires) five to seven times and saw sparks as the bullets ricocheted up. It does not require an advanced degree in physics to understand that bullets fired from an assault weapon that hit hard, dense surfaces, such as a sidewalk, curb, street, or even the ground, may be deflected. Nor does it require detailed familiarity with forensic pathology to know that bullets kill and maim. Under the circumstances, a reasonable man shooting an AK47 at the ground in front of a carload of women (if one can imagine such a paradoxical individual) would expect that someone will catch a stray bullet.

To the majority's credit, they do what they can with an unworkable standard. The problem lies in the distilled phrase "whether a reasonable person . . . would have expected the resulting injury." *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 290; 683 NW2d 656 (2004). This standard distorts the contractual language and overly narrows the exclusion's focus. According to the language of the contract (language that was identical to the exclusion in *McCarn*, *supra*), plaintiff does not cover any bodily injury "which *may* reasonably be expected to result from the . . . criminal acts . . . ." The exclusion goes on to explain that it applies even if the resultant injury differed in kind or degree from what the insured reasonably intended or expected. It also applies if the insured injures an individual other than the person the insured intended or expected to injure. So by the policy's clear language, if Price had aimed at one of the ladies in the SUV, missed, and hit someone a block away, plaintiff would not cover the bystander's injuries even though they concededly were not reasonably expected or intended by Price. Nevertheless, the construction handed down in *McCarn* would apparently turn this analysis on its head and require coverage because a reasonable person would not expect to hit a

bystander a block away. Under the standard in *McCarn*, the exclusion would only apply, at least in the case of reasonable people, to those results that were totally predicted or intended, severely limiting the import of the other language.[1]

What the phrase in *McCarn* overlooks is that the exclusion plainly extends its scope through use of the word "may" in the phrase "may reasonably be expected." The combination of the verb "may" with the adverb "reasonably," turns the issue from one of precise prediction to one of reasonable anticipation. Therefore, the policy excludes coverage for any injuries that a reasonable person might anticipate if the criminal action is taken, not simply those he absolutely anticipates. Applying this standard, the court should ask, is the possibility of the injury something that would ordinarily factor into a reasonable person's decision to refrain from doing the injurious act in the first place. In this case, a reasonable person with a cool head would have appreciated the possibility that firing shots toward the peopled SUV would result in a bullet hurting someone, whether by ricochet or misaim. Furthermore, the reasonable person would foresee other potential injuries, such as hitting the SUV's gas tank, and other targets, such as unseen people passing on the dark street or peering through their windows at the commotion. Under the circumstances, any reasonable jury would necessarily find the exception applicable because a reasonable person might expect such a result from Price's criminal act.[2]

Therefore, I would affirm.

/s/ Peter D. O'Connell

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[1] The result is the majority's preoccupation with the reasonable expectation of minute factual variables. Perhaps Price could have predicted that lead would leave his weapon at a high velocity if he pulled the trigger, but could a reasonable man have foreseen that it would hit the exact spot on the earth that would send the lead upward at the precise angle to impact the side of the SUV? And if so, could a reasonable person anticipate that the SUV's steel exterior would fail to inhibit the bullet, instead potentially altering its flight so that it would take the exact path necessary to impact the injured woman's leg? Would he predict that it would hit that particular part of her leg where it would cause so much damage? Under this scrutiny, no criminal act could be classified as intentional, and no amount of common sense could resolve a factually undisputed case, such as this one, without a jury.

[2] It goes without saying that this case differs from myriad other conceivable factual situations to which the term "accident" readily applies, but which oddly results in some form of criminal responsibility. Merely negligent acts rarely lead to criminal culpability, though, so while I see the potential for future unjust application of these insurance exclusions, I will leave the task of honing the standard to the future panel that must apply the standard to the unusual facts before it.